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IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

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RULE 29.6 LIST

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PETITIONERS' REPLY MEMORANDUM

Respondents have sued a national bank for charging excessive interest and fees with regard to a loan. Respondents recognize and acknowledge they are suing a national bank: They designate the bank by its name which includes its title as a national bank. A suit against a national bank for charging excessive interest and fees is governed exclusively by federal law—in particular, by the provisions of Section 30 of the National Bank Act, 12 U.S.C. §§ 85 and 86. *Evans v. National Bank of Savannah*, 251 U.S. 108, 109, 114 (1919); *Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34-35 (1875); *see Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299,

308 (1978).[1] Respondents' claim thus necessarily, and inherently, arises under and is controlled by federal law. That being so, it could have been filed in a Federal District Court; and accordingly, the suit is removable under 28 U.S.C. § 1441.

If the Complaint had cited the applicable sections of the United States Code or indeed had been silent on the matter of governing law, the case clearly would have been removable. However, even though federal law exclusively governs their claim for excessive interest and fees against a national bank, Respondents seek to preclude removal by wrongly alleging that the suit was brought under Alabama law and by expressly disclaiming any reliance on federal law. Respondents claim that they have thereby made the suit non-removable. But Respondents could not validly disclaim reliance on federal law; federal law is a necessary basis of Respondents' claim.

Respondents do not seem to deny that there is a conflict between the circuits over the issue of whether removal of a usury suit against a national bank can be defeated through this artifice.[2] Instead, they attempt to distinguish the Eighth Circuit decisions which conflict with the decision below, *Krispin v. May Dep't Stores*, 218 F.3d 919 (8th Cir. 2000); and *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608 (8th Cir. 1991). Respondents also claim the issue presented in the Petition is narrow and unimportant. But the Eighth Circuit cases are not distinguishable and, as shown by the volume of reported cases we have cited, Pet. 8-10, 12 n.8, and indeed by the cases Respondents themselves have cited, Op. 2, 12, 15, 18, schemes of this sort, designed to disguise

[1] "[T]here is no question that [12 U.S.C.] § 85 [Section 30 of the National Bank Act] pre-empts state law." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

[2] For another example of the technique, *see* Exhibit A to the Opposition.

the *inherent* federal law character of these usury suits, appear to have become quite common. The importance of this case, and of the issue presented, is further demonstrated by the fact that the Comptroller of the Currency elected to file an amicus curiae brief in support of Petitioners' position in the Court of Appeals. *See* Pet. App. 38a-58a. This Court should grant *certiorari* to decide whether this legal fiction works to oust a federal district court of jurisdiction over a claim that can only arise under the National Bank Act.

1. Additional Claims and Additional Defendants Do Not Defeat Removal.

Respondents claim that, by adding claims against entities that are not national banks and by including separate but related state-law claims of fraud and breach of duty, they have made the suit non-removable or, at least, have made this case substantively different from *Nahas*. Op. 3-5, 9. However, it is plain that if any claim under 28 U.S.C. § 1331 is made against any defendant in a multi-defendant, multi-issue suit, the entire case is removable, and all related claims and all defendants "come along" to federal court under the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). That statute provides that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.[3] Such supplemental jurisdiction shall

[3] Claims are part of the same "constitutional case" if they "derive from a common nucleus of operative fact." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-65 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). A quick review of the allegations and structure of the Complaint here demonstrates that the claims derive from

include claims that involve the joinder or intervention of additional parties.[4]

Clearly, § 1367 "applies with equal force" to removed cases and to cases initially filed in federal court, because "a removed case is necessarily one 'of which the district courts . . . have original jurisdiction.'" *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting 28 U.S.C. § 1441(a)).

Respondents claim also that the Eighth Circuit decisions are distinguishable, because they address free-standing usury claims, unaccompanied by any state law claims. Op. 3-5. The presence of state law claims here, however, is immaterial and does not serve to distinguish *Nahas* from this case: The district court was empowered by § 1367 to exercise supplemental jurisdiction over those additional related claims, and therefore they do not defeat the jurisdiction of the district court on removal. Moreover, contrary to Respondents'

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the same core facts. The counts allege varying wrongs resulting from the same common scheme asserted in the "Factual Allegations" (Complaint ¶¶ 32-37), and repeated in each of the five counts. *See In Re Prudential Sales Practice Litigation*, 148 F.3d 283, 303 (3d Cir. 1998) ("That implementation of Prudential's scheme resulted in a variety of unlawful transactions does not negate the common basis they all shared."). Moreover, in one of the cases in which the Eighth Circuit held that the NBA completely preempted state usury claims, *Krispin v. May Dep't Stores*, 218 F.3d 919 (8th Cir. 2000), the court of appeals reversed the district court's refusal to grant plaintiffs' alternative request for leave to amend to assert claims under the NBA, and directed the district court to reassert supplemental jurisdiction over state law claims for breach of contract, breach of duty of good faith and fair dealing, misrepresentation, unjust enrichment, and civil conspiracy. 218 F.3d at 925. Thus, the credit relationship served as a common nucleus of operative fact for the federal claim and for all of these state law claims.

[4] Petitioner in 02-312, H & R Block, Inc. ("Block"), is not a national bank but was joined as a defendant in a single suit in state court. Block joined Petitioners in the notice of removal.

suggestion (Op. 4), *Krispin* did involve several state law claims, and the Eighth Circuit not only upheld removal, but directed the district court to exercise its supplemental jurisdiction over those state law claims. 218 F.3d at 925.

2. Respondents Misinterpret the Conservative, Narrow Position Taken by Petitioners.

Respondents urge that because the National Bank Act does not make all state laws totally inapplicable to national banks but, rather, leaves certain of the activities of national banks to be governed at least to some extent by state law,[5] this case is different from *Avco Corp. v. Aero Lodge* No. 735, 390 U.S. 557 (1968), and from *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). Respondents accordingly claim that the teaching of those cases cannot be applicable here. But Petitioners do not claim that all cases against national banks, or all cases in which the National Bank Act may be implicated, are removable. Rather, what they do maintain, and what is at issue here, is that suits for usury on the part of national banks are removable, because the particular subject matter of usury by a national bank is governed exclusively by the National Bank Act ("NBA").

Respondents argue that "complete preemption" is a narrow doctrine; that may well be so, but here it is to be applied very narrowly—to usury suits against national banks where clearly the only governing law that provides the right and remedy is a federal statute. Indeed, the exclusivity of federal law as the basis of the usury claim here is at least as clear and strong as it was with respect to the claims under the Labor Management Relations Act ("LMRA") and the Employee Retirement Income Security Act ("ERISA") that this Court found to be preempted in *Avco* and in *Taylor*. *See Avco*, 390 U.S. at 559-60 (complete preemption based on section 301(a)

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[5] *See Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996), for a general list.

of LMRA, 29 U.S.C. § 185(a), which provides federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations"); *Taylor*, 481 U.S. at 60 n.1, 67 (complete preemption based on section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which provides for a civil action "by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan").

In those cases, a broad panoply of contract claims or claims for breach of fiduciary duty were recognized to be "arising under" claims within § 1331 even though the preempting federal statutes govern a potential multiplicity of issues and never mention the precise types of claims found to be preempted in *Avco* and *Taylor*. Here, in contrast, a narrow, detailed federal statute governs the subject of usury for national banks. Consequently, the application of the doctrine of "complete preemption" here is more clear and even more appropriate than it was in this Court's two earlier cases.[6] Congress intended that all such usury claims "arise under" federal law; and so the removal statute, § 1441, in turn represents its will that all such suits are removable at the option of the defendant.

[6] In Respondents' effort to articulate the complete preemption doctrine and to offer reasons why it is not applicable to the National Bank Act, they rely on a lengthy quotation from the divided panel opinion in *Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996). Op. 15-17. That opinion was vacated in light of a strong dissent and set for rehearing *en banc* before the appeal was dismissed, as indeed Respondents acknowledge in a footnote. Op. 15 n.5.

3. This is Not a Case of a "Federal Defense" But a Case of an Exclusively Federal Claim.

Respondents say that what is involved in this case is a federal defense and that what is called the well-pleaded complaint rule would be violated if removal were tolerated here. Op. 7-8. But this is not a case involving removal based upon a defense extraneous to the Complaint—such as, release, limitations, immunity from suit, or the like. Respondents' Complaint on its face reflects that a national bank is being sued for usury, that is for charging excessive fees and interest. Complaint at ¶¶ 58-62 (alleging "Usury Violations"); *see id.* at ¶¶ 35-37 (asserting in "Factual Allegations" section that Defendants charged excessive fees and interest). The well-pleaded factual assertions show that there can *only* be a federal claim made here, because federal law displaces state law on the entire matter of the fees and interest a national bank may charge. There is no issue of a "defense" left to be pleaded by the defendants. The allegation of the Complaint that Alabama law is involved in the usury claim is necessarily a sham and is no more to be respected than if the citizenship of a party were wrongfully asserted by a plaintiff to avoid removal in a diversity case.[7]

[7] Indeed, cases of this sort seem usually to be brought in the home-state courts of the plaintiffs with the defendants being out-of-state national banks and other out-of-state companies. The Complaint in the Opposition's Exhibit A gives an example of the abuse involved to defeat removal on "diversity" (28 U.S.C. § 1332) grounds. The complaint disclaims any recovery above an amount slightly less than the required jurisdictional amount in § 1332. *See* Op. 7a, 9a, 11a. After the case has been on file for a year, that limitation can be amended out of the complaint without fear of removal (*see* 28 U.S.C. § 1446(b)), pleas for punitive damages can then likewise be added, etc. The use of the usury issue presumably turns on persuading the judge to give an instruction on state law usury or on convincing the jury to award damages for alleged "excessive interest" or "charges" under the rubric of the ancillary state law claims of violation of fiduciary duties or the like.

4. The Incorporation of A Federally Designated State Law Into the Alternative Standard Provided By Section 30 of the National Bank Act Does Not Make the Claim Any Less Federal.

As a final effort, Respondents are reduced to claiming that 12 U.S.C §§ 85 and 86 provide for state law. Thus, in effect, they say that a suit for usury against a national bank does not arise under federal law. The texts of §§ 85 and 86 are quoted in their entirety, highlighting the phrase "interest at the rate allowed by the laws of the State . . . ." Op. 10, 18-19 (citing *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998)). Acceptance of Respondents' state law theory would mean that a usury suit against a national bank would not come under § 1331 for any purpose.

What Respondents are highlighting, however, is part of the statutory mechanism by which Congress incorporated state usury law into the NBA to define the permissible rates of interest and federalized any claim of usury as applied to national banks. Congress did not create a federal usury claim to stand alongside a state claim; it took the law of a state *it* defined—the state referred to in the bank's charter—added as an alternative a purely federal standard (based on the Federal Reserve discount) and provided an exclusive detailed federal remedy. The language in §§ 85 and 86 that Respondents point to is an excellent example of a "federal statute . . . that . . . 'converts an ordinary common law complaint into one stating a federal claim . . . .'" Op. 5, quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), the very situation that defines a case of complete preemption; indeed, the process of federalism is more thorough here than it was in *Caterpillar* and *Avco*.

Sections 85 and 86 represent federal law, not state law. Such a suit is maintainable under § 1331 and is removable if brought in state court. *See McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245, 249 (1938) ("[T]he penalty for usury

may be enforced only in a suit for that purpose . . . [and] shall be paid according to the terms of [12 U.S.C. § 86]."). This Court has made it plain that the sole basis for claiming usury against a national bank is the National Bank Act. *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 109 (1919) (stating that "whether transactions by [a national bank] are usurious and the consequent penalties therefor[ ] must be ascertained upon a consideration of the National Bank Act.") (emphasis added). *See also Farmers' and Mechanics' Nat'l Bank v. Dearing, supra*, 91 U.S. at 34-35; *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., supra*, 439 U.S. at 308.[8] Thus, with respect to the propriety or excessiveness of interest and fees charged by a national bank, State law is completely preempted, as set forth in *Smiley*, p. 2 n.1, above.

CONCLUSION

There is a clear and acknowledged conflict between Circuits. The issue in question is one frequently litigated, as the submissions of both the Petitioners and Respondents make clear. The issue is also of vital importance to national banks and their regulator. If *certiorari* is denied, however, this issue will no longer be litigated in federal courts in Alabama or in the rest of the states in the Eleventh Circuit, but will instead be subsumed under the legal fiction of a mythical state law of usury against national banks, to be pleaded in the complaint and then used in state court, after the

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[8] A (somewhat inconsistent) argument is made by Respondents (Op. 9, 13) that the concurrent federal and state court jurisdiction vitiates any intent by Congress to allow removal regardless of artful pleading by a plaintiff. The argument is baseless; there is such concurrent jurisdiction under the relevant provisions of LMRA and ERISA as well. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 505-06 (1962) (LMRA); ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Nonetheless, the rule of decision in them is federal, as it is here, and removal is available despite artful pleading, as it should be here.

inevitable (and unreviewable) remand, for purposes best known to the plaintiffs. The Respondents' opposition indicates, we submit, additional reasons for granting the writ, not reasons for denying it.

For the reasons stated in the Petition and herein, the Petition for Certiorari should be granted.

Respectfully submitted.

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